No. 09-808

Supreme Court, U.S.
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In The
Supreme Court of the United States

SINCERELY YOURS, INC., ET AL.,

Petitioners,

v.

BERTRAM COOPER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

DAVID MCGUIRE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF CONNECTICUT
2074 Park Street
Suite L
Hartford, CT 06106
(860) 523-9146

AARON S. BAYER
Counsel of Record
SABRINA HOULTON
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

To serve the residents of downtown Manchester, Connecticut, the United States Postal Service ("USPS") established a contract postal unit ("CPU"), which is operated by the petitioners' church under an extraordinarily detailed USPS contract and set of postal regulations. While providing the local public with official USPS services, the church advanced its religious mission by posting Christian religious displays throughout the post office, including invitations to submit prayer cards and contributions to the church. Respondents are local residents who use the CPU and object to the religious displays and solicitations they confront there. The Second Circuit unanimously affirmed a district court decision, which the USPS did not appeal, holding that the religious activities in the CPU are subject to, and violate, the Establishment Clause. The questions presented are:

1. Whether the Second Circuit's decision, which was consistent with precedent in this Court and in the other federal circuits, correctly held that respondents have standing to maintain their Establishment Clause claim because they have been personally and directly affected by the challenged conduct?

2. Whether the Second Circuit correctly held that proselytizing religious displays and solicitations in the CPU, which operates on behalf of and under the banner of the USPS and provides USPS services to local residents, are subject to and violate the Establishment Clause?

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PARTIES TO THE PROCEEDING

In addition to Sincerely Yours, Inc., the other defendant-petitioners are Full Gospel Interdenominational Church, Inc., and Dr. Phillip Saunders Heritage Association, Inc.

The intervenor-respondents are Kimon N. Karath and Leslie Strong (hereafter "respondents"). The original plaintiff was Bertram Cooper, who moved to a nursing home and no longer lives in Manchester, Connecticut or frequents the Manchester CPU. Gary Chipman was also an intervenor, but he moved from Manchester to another town in Connecticut and, as a result, no longer patronizes the Manchester CPU.

The United States Postal Service, along with John E. Potter, as Postmaster General of the United States Postal Service and Ronald G. Boyne, as Postmaster of the Manchester, Connecticut Post Office, were defendants in the district court, but the federal government withdrew its Second Circuit appeal on behalf of those parties, and they have not been involved in the case since then.

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COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The petitioners, Sincerely Yours, Inc., Full Gospel Interdenominational Church, Inc., and Dr. Phillip Saunders Heritage Association, Inc. (collectively, the "Church") operate a CPU for the USPS on Main Street in Manchester, Connecticut. App. 2a & n.1.[1] The USPS instituted the CPU program to fulfill its statutory obligation to provide postal services to patrons not adequately served by existing, traditional post offices. *Id.* at 5a. The Manchester CPU is run by the Church, and it prominently displays proselytizing materials throughout the CPU. *Id.* at 9b-13b. "The express and admitted purpose of the religious material is to raise awareness for the mission sponsored by the Church and to spread the Church's Christian message." *Id.* at 27a.

The respondents are residents of Manchester who live in the vicinity of and regularly use the Church's CPU. *Id.* at 4a. They unavoidably encounter the religious displays in the CPU when they go there to obtain USPS services and products. *See id.* at 11a-12a; *see also id.* at 13b-14b. These displays include prayer cards and boxes soliciting contributions to the Church that were on the counter where postal

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[1] Citations to "App." are to petitioners' appendices. The citations with an "a" after the page number refer to the Second Circuit's opinion, and the citations with a "b" after the page number refer to the district court's opinion.

patrons obtain USPS services and products. *Id.* at 10b-10c; *see also id.* at 11a.

A. CPUs Operate Under the Federal Postal Service Monopoly as Units of the USPS

The U.S. Constitution provides Congress with the power "[t]o establish Post Offices," Art. I § 8, and Congress, in turn, has delegated that power to the USPS, "award[ing] the USPS a monopoly over the carriage of letter mail." *Id.* at 4a.[2] It is therefore a crime to set up a "post office" without authority from the USPS. *See* 18 U.S.C. § 1729; *see also* App. at 4a.

Congress also mandates that the USPS shall "serve as nearly as practicable the entire population of the United States." 39 U.S.C. § 403(a); *see also* App. at 4a-5a. To fulfill that mandate, the USPS not only operates traditional (or "classified") post offices, but also contracts with private entities to operate CPUs to "furnish postal services to places where it is not otherwise geographically or economically feasible to build and operate official 'classified' post offices." App. at 5a.

Because "[i]t is very important to the success of [the CPU] that customers can recognize [it] as an

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[2] This monopoly is codified under the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, which "have existed in one form or another since passed by the First Congress in 1792." *Brennan v. U.S. Postal Serv.*, 439 U.S. 1345, 1347 (1978).

official United States Post Office contract unit," *id.* at 36b (quoting the Postal Operations Manual), the USPS tightly controls the look and function of the CPU to establish a "uniform image," *id.* at 9a (quoting the standard CPU contract). The USPS's standard form CPU contract therefore specifies the precise appearance of the CPU, including the layout, the furnishings, and the lighting. *See id.* The USPS, through its standard CPU contract, "agrees to pay for (among other things) the construction of postal service counters and other build-out requirements, all according to detailed specifications" to ensure a "uniform image." *Id.* The contract also appoints a "Contracting Officer's Representative" or "COR" "to ensure compliance with the CPU contract and governing regulations, and to provide general oversight." *Id.* at 9a-10a. The USPS makes it clear that the CPU "reflects not only on" the entity operating it, "but also on the [USPS]." *Id.* at 6a-7a (quoting USPS Contract Postal Unit Operations Guide).

B. The Manchester CPU Is Required to Present Itself to the Public as an Official Unit of the USPS

For over fifteen years, the USPS has relied on CPUs to ensure that the citizens of Manchester, Connecticut, have access to USPS products and services. *Id.* at 8a. After the "Community Place" CPU in Manchester suspended its operations in 2001, the USPS solicited proposals to replace it. *Id.* The Church was one of two bidders, and the USPS ultimately

awarded the contract to the Church on November 21, 2001. *Id.* The Church subsequently incorporated Sincerely Yours, Inc. ("SYI") "for the purpose of operating the CPU." *Id.*

The Manchester CPU "offers a variety of postal services including Express, Priority, and First Class domestic mail; international mail; insurance, certification, and delivery confirmation services: Post Office Box rentals; and sales of stamps, stationery, and other packing products." *Id.* at 10a. The USPS sets the prices for these products and services. *Id.* at 11a. Under the performance-based postal unit contract, all revenues from sales of USPS products and services at the unit belong to the USPS, but 18% of those sales, and 33% of all post office box rentals, are paid to the Church. *Id.* at 9a.

As required by its contract with the USPS and in order to obtain business from USPS customers, the Church has taken numerous measures to ensure that the Manchester CPU is understood to be an outlet of the USPS. For example, there is a "relatively substantial sign on the outside of the [Church's] CPU that contains the words 'United States Post Office' and displays the Postal Service's aquiline emblem." *Id.* at 32b. Under the USPS contract, the USPS paid for (among other things) "the construction of postal service counters and other build-out requirements, all according to detailed specifications." *Id.* at 9a. And the CPU's interior contains "official USPS postal supplies, paperwork, and mailing boxes." *Id.* at 10a.

C. The Church Used the Manchester CPU to Proselytize Local Postal Patrons

There are numerous religious displays posted by the Church throughout the Manchester CPU. *Id.* at 11a; *see also id.* at 9b-13b. These displays are intended to further the mission of the Church. *See id.* at 27a; *see also id.* at 39b-40b. The Church's mission is to "engage in the preaching of the Gospel of Jesus Christ . . . [and] establish . . . Churches for the advancement of the kingdom of Jesus Christ," and to "send forth preachers and workers whose princip[le] objective shall be to promote the Kingdom of the Lord Jesus Christ." *Id.* at 39b-40b (alteration supplied).

Inextricably intertwined with the official USPS signs, emblems, and materials required to be displayed at the CPU, are numerous evangelical messages and displays about the Church and its religious mission, including:

- "[A] large religious display that informs customers about Jesus Christ and invites them to submit a request if they 'need prayer in their lives'" is located "directly to the right of the postal counter and slat wall," *id.* at 9b-10b;
- "[A] pile of 'prayer cards' and a box into which postal service customers can put their prayer requests" is located "[d]irectly on the postal counter," *id.* at 10b;
- A display "containing a framed advertisement for World-Wide Lighthouse Missions, the missionary organization incorporated by

> the Church to which the SYI CPU's profits are donated . . . sits directly opposite a shelving unit containing official USPS postal supplies and forms and above a table used by customers filling out USPS paperwork," *id.* at 11b;
>
> - The same display also "offers biblical quotations and explains that the organization is 'Endeavoring to Reach the World with the Love of Jesus Christ, one life at a time,'" *id.*;
> - A "World-Wide Lighthouse Missions" donation jar also "sits on the postal counter," *id.*; and
> - "[A] television monitor display[ing] Church-related religious videos" is located "[t]o the left of the postal counter . . . and in plain view . . . of customers waiting in line at the postal counter," *id.* at 12b.

See generally id. at 9b-12b (offering a more complete description of the religious displays).

Local Manchester residents who use this downtown postal unit for USPS postal services and supplies cannot avoid encountering these pervasive religious messages and practices. Contrary to the mischaracterizations in the petition, the religious displays are not "passive," Pet. at 21-22, and the local resident respondents are not simply "uncomfortable observer[s]" or "concerned bystanders," *id.* at 15-17, but active participants seeking government services at their local post office, who are offended by the proselytizing religious practices they encounter there.

II. PROCEDURAL BACKGROUND

Offended by having to confront these religious displays at the CPU, Mr. Cooper, the original plaintiff in this case, complained to CPU employees but "was told that [he] could go somewhere else if [he didn't] like it." App. at 12a (quoting Affidavit of Bertram Cooper). Instead, Mr. Cooper filed this action in October 2003 against the USPS. *Id.*[3] Subsequently, the Church obtained permission to intervene as a defendant. *Id.*

On cross-motions for summary judgment, the district court held that, for the purpose of the Establishment Clause, the Manchester CPU is a state actor, and the religious displays at the CPU violate the Establishment Clause. *Id.* at 12a-13a. The court issued declaratory and injunctive relief against both the USPS and the Church barring those displays. *Id.* at 13a.

Both the USPS and the Church moved to alter or amend the judgment. *Id.* The Church offered to cure the Establishment Clause violation "by removing the two large signs and one small sign containing the words 'United States Post Office,' and by adding a sign indicating that SYI was a 'private entity,'" *id.*, but the USPS objected, noting that the official USPS signage was contractually required and could not be

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[3] The complaint also named as defendants U.S. Postmaster General John E. Potter and Manchester Postmaster Ronald G. Boyne.

removed. Def. Postal Serv.'s Resp. to Intervening Defs.' Mot. to Alter or Amend J., filed June 4, 2007, at 2-3 (district court docket no. 83). The district court denied the Church's motion, but, without objection from the plaintiff, granted the portion of the USPS's motion requesting that the judgment be amended to limit the scope of the injunction to the Manchester CPU only. *See id.*

Although all of the defendants initially appealed the district court's rulings to the United States Court of Appeals for the Second Circuit in October 2007, the U.S. government voluntarily dismissed the appeal filed on behalf of the USPS (along with its employees U.S. Postmaster General John E. Potter and Manchester Postmaster Ronald G. Boyne). *See id.* The district court granted a stay pending appeal on November 1, 2007.

While the appeal was before the Second Circuit, it became clear that Mr. Cooper, whose health had required him to move into a nursing home in West Hartford, was in all likelihood not going to return to the Manchester CPU. Three other local residents – Gary Chipman,[4] Kimon Karath, and Leslie Strong – were granted permission by the Second Circuit, without objection from the Church, to intervene to defend the district court's judgment on appeal. *Id.* at

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[4] After filing the motion to intervene, Gary Chipman moved from Manchester and no longer uses the Manchester CPU. As a result, the respondents are Kimon Karath and Leslie Strong.

4a. The intervenors stood in the same position as Mr. Cooper. In their affidavits in support of their intervention motion, they attested that they patronized the local CPU, objected to the religious displays they encountered there, and adopted the allegations and claims of the complaint. *Id.* at 4a, 11a-12a; Declarations of Kimon N. Karath and Leslie Strong, dated Apr. 28, 2008, ¶¶ 3-4 (filed with the Second Circuit on Apr. 30, 2008 in support of the Motion of Proposed Intervenors, also filed Apr. 30, 2008).

The Second Circuit issued its unanimous decision on August 20, 2009, holding that the respondents had standing, App. at 18a, that the CPU is subject to the Establishment Clause as a government actor, *id.* at 22a, and that the Church's displays of religious materials in the CPU "clearly fail the *Lemon* test" and violate the Establishment Clause, *id.* at 27a.

The Second Circuit observed that standing required a "'direct and personal stake' in the controversy" *Id.* at 18a. Because Mr. Cooper claimed "that he was made uncomfortable by direct contact with religious displays that were made a part of his experience using the postal facility nearest his home, and that upon complaint, he was advised to alter his behavior," he had established an injury "sufficient to support standing." *Id.* The Second Circuit focused on the original plaintiff, Mr. Cooper, but acknowledged that the intervenors were "similarly aggrieved." *See id.* at 4a, 17a-18a.

In holding that the CPU functioned as a state actor, the Second Circuit relied on the "public function" test and concluded that, to the extent that the CPU accepts and processes mail, sells postal products, and participates in the safe carriage of mail, "it performs . . . 'activit[ies] that traditionally ha[ve] been the exclusive, or near exclusive, function of the State.'" *Id.* at 22a (alteration in original) (quoting *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004)).

"Having determined that" the CPU "is operating as a state actor under the public function test," the Second Circuit applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether the religious displays violated the Establishment Clause. *Id.* at 23a. Under the *Lemon* test, the court must consider whether the conduct at issue: (1) has a secular purpose; (2) has a principal effect that neither advances nor inhibits religion; and (3) does not bring about an excessive government entanglement with religion. *Id.* at 25a. As to the secular purpose requirement, the Second Circuit held that the religious displays in the CPU "fail spectacularly." *Id.* at 27a. It went on to conclude:

> Having failed at the first juncture, there is no need to proceed further in the *Lemon* test, although it is no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion (and might arguably

> entangle the government excessively with religion).

Id. On that basis, the Second Circuit affirmed the district court's decision that the religious displays in the CPU violate the Establishment Clause.

The Second Circuit, however, did amend the district court's remedy. Rather than requiring the Church to remove all religious displays from the CPU, the court remanded so that the injunction could be revisited and amended to bar religious displays only in the "primary area serving the public function" and therefore be limited to the "extent of the state action." *Id.* at 31a-32a.

The Church filed its petition for a writ of certiorari on November 17, 2009.

REASONS FOR DENYING THE WRIT

The Church's petition offers no hallmarks of a case worthy of this Court's consideration. On the principal issue – whether the Second Circuit's standing analysis was correct – the petition concedes that there is no conflict among the circuits. On the contrary, it acknowledges that the circuits have consistently interpreted and applied this Court's standing rules in Establishment Clause cases, just as the Second Circuit did here. Pet. at 15-16 (citing uniform case law from *ten* of the federal circuits).

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The petition essentially asks the Court to depart from this uniform body of precedent and adopt a principle it has repeatedly rejected – that an injury must be physical or economic to confer standing. Petitioners advocate such a drastic change in the law, which would effectively eliminate Establishment Clause challenges to many types of governmental religious activity, because it is the only possible way to challenge standing here. The respondents are local residents who patronize their local post office and unavoidably encounter pervasive, proselytizing religious displays and solicitations there, which they find objectionable. In other words, they are precisely the type of plaintiffs who have standing under existing law.

Nor does the Second Circuit's decision on the merits of the Establishment Clause claim warrant this Court's review. Based on the highly unusual facts of this case, in which the Church operates the local post office on behalf of and under extensive regulation by the USPS, the Second Circuit reached the unassailable conclusion that the religious displays and solicitations that confront postal patrons there are properly considered government action subject to Establishment Clause limits. Equally unremarkable is the Second Circuit's holding that the proselytizing religious displays violate the Establishment Clause, because they "fail spectacularly" the requirement that they serve a secular purpose. App. at 27a.

The Second Circuit's highly fact-specific decision breaks no new ground and has limited precedential impact. The relationship between the USPS and operators of CPUs is unique, and has no bearing on government contractor cases. The Church here is not a mere contractor; it operates as an arm of the USPS, providing government services to the public that the USPS is statutorily obliged to provide. And the relief granted is limited to the one postal unit in downtown Manchester, Connecticut, and even there it precludes religious displays only in those areas of the unit that are devoted to providing postal services to the public.

Under the circumstances, it is not surprising that the U.S. government chose not to pursue an appeal in the Second Circuit on behalf of the USPS. Nothing in the Second Circuit's unanimous decision makes the case worthy of this Court's attention.

I. THE SECOND CIRCUIT PROPERLY HELD, CONSISTENT WITH THE LAW OF THIS COURT AND OTHER FEDERAL CIRCUITS, THAT RESPONDENTS HAVE STANDING, AND REVIEW OF ITS DECISION IS NOT WARRANTED

The Second Circuit applied this Court's long-standing case law – precedent consistently followed by the federal circuits – in concluding that respondents had established an injury sufficient to support standing based on their direct, personal, and unwelcome contact with the proselytizing religious displays and activities in their local post office. *See id.*

14a-18a. Petitioners acknowledge the absence of any circuit conflict – indeed they note that the Second Circuit's standing analysis is consistent with the "settled practice in the lower courts," Pet. at 17, citing as examples consistent case law from ten of the federal circuits. *Id.* at 15-16.[5] They argue that all of

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[5] Petitioners cite the following cases, which demonstrate the absence of a split among the circuits: *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1251-53 (9th Cir. 2007) (finding standing where plaintiff claimed "direct contact with the purportedly offensive anti-religious symbol at issue"); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222-23 (10th Cir. 2005) ("Allegations of personal contact with a state-sponsored image suffice to demonstrate . . . direct injury" sufficient to support standing.); *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir. 2005) (standing for plaintiff who alleged direct and unwelcome contact with a religious display); *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (plaintiff has standing because he alleged "government establishment of religion to which he, personally and directly, has been subjected"), *vacated on other grounds and expressly aff'd on standing after reh'g en banc*, 419 F.3d 772, 775 n.4 (8th Cir. 2005); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 255 n.3 (3d Cir. 2003) (personally encountering a religious display on multiple occasions confers standing); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) (finding standing based on "direct and unwelcome contact" with the challenged display); *Suhre v. Haywood County*, 131 F.3d 1083, 1090 (4th Cir. 1997) ("The cognizable injury caused by personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case."); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682 (6th Cir. 1994) (holding that standing requires allegations of unwelcome, direct contact with the offending conduct); *Murray v. City of Austin*, 947 F.2d 147, 150-51 (5th Cir. 1991) (concluding that personal contact with challenged religious symbol through receipt of "many items of correspondence from the City"

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the courts have somehow gotten it wrong, and invite this Court to step in and create a new and more stringent standing requirement for Establishment Clause cases. The standard they suggest makes no sense and directly contravenes this Court's jurisprudence.

A. Petitioners Seek a Dramatic and Unwarranted Change in Long-Established Standing Principles

1. Standing principles are well-established, although often difficult to apply. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (emphasis omitted) (quoting

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sufficient to find standing); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (holding that plaintiff's "allegations of direct, personal contact suffices as non economic injury"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (finding standing premised on "direct contact with the offensive conduct"); *Hawley v. City of Cleveland*, 773 F.2d 736, 739-40 (6th Cir. 1985) (finding standing based on plaintiff's allegation that the challenged conduct impairs his use and enjoyment of an airport). Plaintiffs also cite *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989), which assumes that plaintiffs, who were "residents of the area [and] who ha[d] been exposed to the" religious display "in the course of their daily activities," had standing without expressly addressing the issue.

Allen, 468 U.S. at 751). Standing in Establishment Clause cases is no different than it is for other claims. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489-90 (1982).

There is little doubt that the respondents here meet those requirements. They are local residents who patronize the local post office and object to the religious displays and solicitations they unavoidably encounter when they go there for government services and products. Indeed, they are precisely the plaintiffs that should be bringing a case like this one – people who are directly affected by the challenged conduct and have a personal, concrete stake sufficient to litigate the case vigorously and seek meaningful relief. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (injury requirement is to ensure that party has "a direct stake in the outcome").

2. Faced with this reality, petitioners argue for a dramatic change in the "injury" requirement in Establishment Clause cases to eliminate non-physical, non-economic injuries as a basis for standing. They claim that "the psychological consequence presumably produced by an observation of conduct with which one disagrees" does not constitute an injury for standing purposes. Pet. at 19 (quoting *Valley Forge*, 45 U.S. at 485). But their argument turns on a single statement taken out of context from *Valley Forge*, is inconsistent with subsequent case law, and presents no issue warranting this Court's review.

Valley Forge addressed the consequences of conduct *not personally experienced.* The plaintiffs in that case were from Maryland, Virginia and Washington, D.C., but the challenged land transfer – which they only learned about "through a news release" – took place in Pennsylvania. 454 U.S. at 486-87. In short, they complained of conduct that had no direct impact on their own lives, contravening the most basic standing principle. *Valley Forge* does not preclude standing based on the harm one incurs when forced to encounter objectionable religious displays; it merely requires that it be directly and personally experienced. Indeed, the Court in *Valley Forge* made it clear that it was "not retreat[ing] from [its] earlier holdings that standing may be predicated on non-economic injury," 454 U.S. at 486, demonstrating that the very issue petitioners claim is worthy of this Court's attention is based on a misreading of *Valley Forge.*

Petitioners labor to distinguish other Establishment Clause decisions that are inconsistent with their strained interpretation of *Valley Forge.*[6] In

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[6] Although not Establishment Clause cases, this Court's decisions in *Allen* and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), held that injury for standing purposes may be predicated on non-physical, non-economic harm. In *Lujan*, this Court found that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for [the] purpose of standing." 504 U.S. at 562-63. In *Allen*, while holding that the plaintiffs did not have standing, the Court noted that "the stigmatizing injury often caused by

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School District of Abington Township v. Schempp, 374 U.S. 203, 205 (1963), for example, the injury to the interests of school children, who were "directly affected" by mandatory Bible readings in their public schools, "surely suffice[d] to give [them] standing to complain." *Id.* at 225 n.9. Petitioners argue that the *Schempp* plaintiffs were a captive audience forced to absorb an active religious message, whereas, in this case, the respondents "mere[ly] observ[ed] . . . the church's passive displays in the non-coercive setting of the CPU." Pet. at 22.

But the displays in the CPU are not passive; they actively seek the participation of the postal patrons in the Church's religious practice through prayer and financial contribution. Nor is the setting "non-coercive," as the USPS has a monopoly on certain

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racial discrimination . . . is sufficient in some circumstances to support standing." 468 U.S. at 755. The plaintiffs in *Allen* did not have standing because they "were not personally subject to the challenged discrimination." *Id.* Thus, both *Lujan* and *Allen* recognize that a plaintiff can establish harm for standing purposes by demonstrating a personally-experienced injury that has no physical or economic manifestation.

Petitioners rely on *Allen*, claiming that the respondents here were "not subject to discriminatory treatment or restraint at the church's postal unit." Pet. at 20. The respondents, however, are pursuing an Establishment Clause violation and not a violation of the Equal Protection Clause, and therefore the absence of discriminatory treatment is irrelevant. The respondents' personal objection to unwelcome contact with petitioners' religious displays in their local post office establishes standing in this case.

postal services and the Church's CPU is the post office serving downtown Manchester. And, contrary to the repeated characterization in the petition, the respondents are not simply "offended observers" or "concerned bystanders." They are residents actively seeking government services in their local post office who cannot avoid being proselytized when they transact business there. The respondents' ability to utilize a more distant post office is no different than the ability of the students in *Schempp* to "absent themselves upon parental request" from the challenged Bible readings, which did not defeat standing in that case. 374 U.S. at 224-25.

This Court has reached the merits in a litany of Establishment Clause cases involving similar injuries based on offensive religious displays. As the Fourth Circuit explained,

> [t]he best proof of our reading of *Valley Forge* lies in the actions of the Supreme Court itself. In two religious display cases subsequent to *Valley Forge*, *Allegheny County v. ACLU*, 492 U.S. 573 . . . (1989), and *Lynch v. Donnelly*, 465 U.S. 668 . . . (1984), the Court has proceeded to the merits of the challenges to the displays and found no infirmity in the standing of plaintiffs alleging direct contact with them.

Suhre, 131 F.3d at 1088. That line of precedent in this Court – considering Establishment Clause challenges to religious displays and practices where direct contact and personal offense is the only injury – has

continued unabated.[7] As acknowledged in the petition, Pet. at 15-16, there is a similar line of uniform precedent in the federal circuits.[8] When the courts have found standing absent, the plaintiffs have not personally experienced the challenged conduct.[9]

3. If this Court were to adopt petitioners' analysis, few if any citizens would ever have standing to challenge many of the most blatant possible Establishment Clause violations. No local resident would have standing to bring an Establishment Clause challenge here, even if the Church conducted

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[7] *See, e.g., McCreary County v. ACLU*, 545 U.S. 844 (2005) (addressing whether posting of the Ten Commandments on courthouse walls violated the Establishment Clause, despite absence of any allegations of any economic or physical injury); *Van Orden v. Perry*, 545 U.S. 677, 682 (2005) (addressing the constitutionality of a display of the Ten Commandments in a public park, noting that plaintiff personally "encountered the Ten Commandments monument during his frequent visits to the" state capitol "for the purpose of using the law library in the Supreme Court building."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (addressing the merits of plaintiffs' challenge to prayer before school football games though plaintiffs appeared to have suffered only a psychological injury).

[8] *See supra* note 5.

[9] *See, e.g., ACLU-NJ v. Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (plaintiffs lacked standing where they had not seen the religious display at issue, except for purposes of the litigation, and did not claim offense from the display); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497-98 (5th Cir. 2007) (plaintiffs lacked standing where there was no evidence they had ever "attended a school board session at which a prayer like those challenged here was recited").

religious services in the CPU and offered holy communion to postal patrons when they sought to buy stamps or collect their mail – so long as those patrons did not suffer physical or economic injury. That has never been, and should never be, the law.

B. The Second Circuit Correctly Held that Respondents Have Standing

Respondents have suffered a direct, personal injury and, accordingly, the Second Circuit correctly held that they have standing. They are local residents of Manchester, Connecticut, who personally patronize the CPU to obtain USPS products and services. App. at 4a, 10a-12a. *See Lujan*, 504 U.S. at 565-66 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it.") (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 887-888 (1990)). They are not geographically-divorced from the challenged conduct, nor do they assert a claim to vindicate the rights of others. They suffered personal, direct, and unwelcome contact with the religious displays and practices in the CPU – a sufficiently direct injury to have a meaningful, personal stake in the controversy and its outcome.

Elevating form over substance, petitioners suggest that the respondents lack standing because they state in their declarations that they "object" to the religious displays in the post office, rather than

saying they suffer "offense" as a result of those displays. Pet. at 26. Common sense dictates that the harm caused by direct, unwelcome contact with proselytizing religious displays can be described in more than one way, and standing law does not require invocation of a single talismanic word or phrase.[10] Indeed, elsewhere the petition argues that terminology does not matter because no words conveying psychological harm would be sufficient to establish standing. *Id.* at 19.

In their declarations supporting their motion to intervene, the respondents also specifically adopted the allegations and claims contained in the complaint, and the Second Circuit found that they stood in the same position and had suffered the same injury as Mr. Cooper. App. at 4a ("Cooper stopped using the CPU when he entered a nursing home, but the suit has continued on behalf of three intervenors who are similarly aggrieved."). There is, therefore, no basis for the petitioner's alternative suggestion (Pet. at 30) that the Court grant certiorari and declare the respondents' claims – which remain as important to them today as earlier in the case – to be moot.

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[10] In fact, the definitions of "offense" and "object" overlap. The definition of "offense" includes "the state of being displeased, insulted, or morally outraged." *Webster's Third International Dictionary* 1566 (2002). The definition of "object" includes "to feel aversion or distaste for something." *Id.* at 1555.

II. THE SECOND CIRCUIT PROPERLY CONCLUDED THAT RELIGIOUS ACTIVITIES IN THE CPU ARE SUBJECT TO, AND VIOLATE, THE ESTABLISHMENT CLAUSE

Petitioners challenge the Second Circuit's conclusion that the religious displays violate the Establishment Clause and its conclusion that the displays are attributable to the government and therefore subject to Establishment Clause limitations in the first place.

1. Petitioners' argument on the merits of the Establishment Clause violation borders on frivolous. It is obvious that proselytizing religious displays serve no "secular purpose," as required by the first part of the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[11] As the Second Circuit starkly put it, the Church's displays of religious materials throughout the CPU "fail spectacularly under the first inquiry of *Lemon*." App. at 27a. The court added that "it is no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion (and might arguably entangle the government excessively with religion)." *Id.*[12]

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[11] To satisfy the three-pronged *Lemon* test, challenged conduct must: (1) have a secular purpose; (2) have a principal effect that neither advances nor inhibits religion; and (3) not bring about an excessive government entanglement with religion. 403 U.S. at 612-13.

[12] The USPS implicitly recognizes this as well, as its regulations expressly bar the display of religious materials in all "classified," full-service post offices. App. at 7a-8a & 8a n.7.

2. Petitioners' real claim is that the religious displays are not attributable to the government because the Church is a private actor. To be sure, the Church is a private party, and it is free to pursue its religious mission as it pleases – but not while it is operating the local post office on behalf of, under the banner of, and under the strict regulation of, the USPS, offering postal services that the USPS is obliged to provide to local residents, and sharing the revenues from the sale of those services. As the petition notes, the key is not the Church's speech, but "the context of its presentation," Pet. at 14, and in the context of this case, the Church cannot advance its own religious mission in the context of running the local post office for the USPS.

The Second Circuit concluded that the petitioners are "a state actor pursuant to the public function test, but only as to those areas of [the CPU] where the public function takes place, namely the postal counter, the postal boxes, and the shelving unit that stores and displays postal materials." App. at 23a. The district court reached the same result, but using a different analysis. It held that "[i]n certain circumstances, a private organization may be so entwined with government that its conduct may be deemed *per se* state action," App. at 29b, and found that the "CPU is so entwined with the Postal Service

that the . . . CPU's actions may be considered the actions of the Postal Service," *id.* at 30b.[13]

Both conclusions are correct. Under either the public function test or the entwinement test, it is clear the Church is stepping into the shoes of the USPS in downtown Manchester for the purpose of operating the post office there. Petitioners ask the Court to disregard that context and analyze the religious displays independent of their location in a post office. *See* Pet. at 33-35. But that is precisely what the local residents are challenging in this case. The Church and its members are free to proselytize and preach in their Church. But operating the local post office for the USPS provides a unique platform for the Church to advance its religious mission, because that is where the members of the community must come to obtain USPS products and services. In that context, the Establishment Clause limits the USPS operator's ability to convey its religious messages and solicit support for the Church from postal patrons.[14]

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[13] In support of its conclusion, the district court focused on the extensive USPS oversight of the CPU and the required USPS design and signage, which are intended to ensure public recognition of the CPU as an arm of the USPS. App. at 31b-36b.

[14] Petitioners argue that the Court should separate the public function of operating a postal unit from the "space" in which that function takes place. *See* Pet. at 34. But the Church is permitted to perform that *function* only in the agreed-upon *space* that meets detailed specifications set by the USPS and

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3. Petitioners mischaracterize this case, despite its obviously limited facts and holding, as one with broad implications. They suggest that the Second Circuit decision might affect "the rights of . . . innumerable private religious speakers whose expression arises in the context of a contract or other mutually beneficial relationship with the government." *Id.* at 36. But this is not a government contractor case. The Church is not simply selling goods or services to the government. It is running the post office in downtown Manchester, Connecticut – stepping into the shoes of the federal government and taking on a government function exclusively belonging to the USPS. The Church provides USPS services to the local residents under the banner of the USPS, and uses that position to advance its religious mission. The Second Circuit's application of traditional Establishment Clause limits to the Church's activities as a USPS operator is a narrow, fact-bound decision that does not warrant intervention from this Court.

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that conforms with the uniform image of the USPS. Without that space, the Church could not operate the CPU. Moreover, the Second Circuit took pains to limit the reach of the injunction to those areas of the CPU in which the Church performs a public function, to separate the areas in which the Church provides post office functions from any areas in which it offers religious materials. App. at 31a-32a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

DAVID MCGUIRE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF CONNECTICUT
2074 Park Street
Suite L
Hartford, CT 06106
(860) 523-9146

AARON S. BAYER
Counsel of Record
SABRINA HOULTON
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

Attorneys for Respondents